

**NATIONAL LABOR RELATIONS BOARD**

INTERNATIONAL ASSOCIATION OF	:	CASE NO: 28-RC-201988
HEAT & FROST INSULATORS AND	:	
ASBESTOS WORKERS, LOCAL	:	
UNION 76	:	
	:	
Petitioner,	:	<b>EMPLOYER’S BRIEF ON</b>
	:	<b>REVIEW</b>
and	:	
	:	
CLASSIC INDUSTRIAL SERVICES,	:	
INC.	:	
	:	
Respondent	:	

Pursuant to Section 102.67(h) of the Rules and Regulations of the National Labor Relations Board (“Board”), the Employer, Classic Industrial Services, Inc., (“Classic” or “Employer”) submits the following Brief on Review for consideration by the Board in its review of the Regional Director’s Decision and Certification of Representative. As stated in Classic’s Request for Review, the Regional Director’s decision raises important issues regarding the determination of supervisory status.

**INTRODUCTION**

Classic’s Request for Review is based on the alleged supervisory status of three employees (foremen) who voted in a July 2017 union representation election. The International Association of Heat & Frost Insulators and Asbestos Workers, Local Union 76 (“Union”) challenged these employees, and, therefore, had the burden of establishing the employees’ supervisory status. Although the Union did not meet its burden, the Regional Director sustained the challenges and certified the Union as the bargaining unit’s representative. The Regional Director erred in sustaining these potentially outcome-determinative challenges.

## **FACTUAL AND PROCEDURAL BACKGROUND**

Classic is a commercial and industrial contractor with its headquarters located in Baton Rouge, Louisiana. Tr. 218:16-17. Classic provides scaffolding, insulation and welding services at a power plant located in Fruitland, NM. Tr. 250:21-251:20. The plant consists of different “units” that are capable of producing varying amounts of electrical energy. Tr. 212:24-213:6. There are four units inside the parameters of the fence of the plant. *Id.*

The employees in question are working foremen or foremen (the terms are used interchangeably). Foremen work in a crew with mechanics A and B. Tr. 210:11-14. On the insulation side, a mechanic A works in metal and a mechanic B works in insulation. Tr. 210:15-20. There are also welders and helpers, who work with both metal and insulation. Tr. 211:4-7. Bergeron testified that “everyone” supervises helpers, and gives them instructions. Tr. 237:4-23.

Welders perform tasks such as putting nails in ducts or pipes “where the insulation goes to hold it up.” Tr. 23:2-5. Welders also install metal plates. Tr. 23:19-24:3. Metal mechanics cover insulated pipes and ducts with sheet metal. Tr. 93:24-94:3. Insulation workers install insulation on pipes to keep them heated. Tr. 24:12-19.

### **A. The Election**

On July 7, 2017, the Union filed a petition with Region 28 of the NLRB, seeking recognition as the bargaining representative for certain Classic Industrial employees.

Pursuant to a Stipulated Election Agreement, a secret ballot election was scheduled for July 28, 2017. (Board Exhibit 1(a)). The Stipulated Election Agreement identified the Unit and Eligible Voters to include: “All full-time and regular part-time helpers, welders, mechanic metal workers, mechanic insulators, and mechanic pipe workers employed by the Employer at the APS Plant in Fruitland, New Mexico.” (Board Exhibit 1(a)) Excluded were “[a]ll other employees, office clerical employees, scaffold workers, guards, and supervisors as defined by the Act.” (Board Exhibit 1(a)).

Both the Employer and the Union challenged certain ballots, but the Union asserted the vast majority of these challenges. Following the July 28<sup>th</sup> election, the tally of ballots provided the following results:

Approximate number of eligible voters	107
Number of votes cast for Petitioner	32
Number of votes cast against participating labor organization	8
Number of valid votes counted	40
Number of challenged ballots	38
Number of valid votes counted plus challenged ballots	78

(Board Exhibit 1(a)).

## **B. The Hearing**

A hearing was conducted from August 21 – 23, and the parties were given an opportunity to present evidence regarding challenged ballots and election objections. (Board Exhibit 1(a)). At the hearing, the parties mutually agreed that challenges to six ballots should be sustained.

The parties then presented evidence regarding a remaining total of 32 challenged ballots. Four ballots were challenged on the basis of alleged supervisory status, including the ballots that are currently at issue (the ballots belonging to Foremen David Trevino, Juan Godoy, and Jose Gonzalez-Flores).

The Union presented testimony from former employee, Luis Lopez, who worked as a welder foreman for two weeks prior to resigning; Jose Sergio Alvarez, who worked in insulation for approximately four months; and Gustavo Frias, who worked in insulation for approximately six months prior to the hearing.<sup>1</sup> Classic presented testimony from Director of Craft Resources and Training Development Thomas “Kevin” Bergeron and Project Coordinator Joshua Jonas.

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<sup>1</sup> Lopez worked as a welder prior to his brief tenure as a foreman.

**i. Summary of Relevant Testimony from the Hearing**

Much of the work performed by a foreman's crew is not highly skilled. For example, Frias indicated that metal workers "help the insulators when they're behind on their work." Tr. 92:23-93:1. Lopez also stated that welders are also asked to "do insulation work when they need workers." Tr. 61:17-19. A helper could be elevated to a mechanic B by observing other insulators or metal workers in the field, and "trying to pick up on what [they] are doing." Tr. 242:7-18. Welders have to be certified through a third-party organization, but Lopez described their job as "put[ting] the nails, put[ting] on that support, which is a metal plate." Tr. 24:1-3; 233:15-17.

Foremen are treated the same as other workers in many respects. Lopez, the Union's witness, indicated that his pay remained the same after he was promoted to foremen. (Tr. 58:12-15). Lopez stated that he resigned from Classic because new hires were being paid more than him, and he wanted "equality" with other workers. (Tr. 53:1-14). Bergeron testified that there is "a little difference" between Mechanic A's and foremen – "The foreman's a little better skilled than what the Mechanic A is, as into performing the job at hand. He's a little better understand [sic] of how the total job is to be laid out." Tr. 264:3-7.

The details of each work assignment come from blueprints, such as a print of a duct or piping. Tr. 246:19-21. The blueprints include details such as whether a pipe needs insulation, the thickness of the insulation, the temperature of the insulation, etc. Tr. 246:19-24. If there is an issue with the specifications that are given, a foreman cannot deviate from the blueprints without express permission from the superintendent. Tr. 248:11 – 21.

Bergeron explained that general foremen meet with foremen each day and "show them exactly what needs to be done" by going over specifications. Tr. 205:15-22. General foremen are responsible for determining work placement each day, and pairing each employee with a working foremen. Tr. 20:11 – 17; 60:24 - 61:2; Tr. 26: 4 – 15; Tr. 29:17 – 20. As Union witness Lopez succinctly put it,

“[t]he instructions were [sic] all the workers would come from the general foreman. . . . Directly from the general foreman.” Tr. 61:1 – 4.

Jonas summarized the foreman position as follows: “he . . . is there to direct the crews to make sure they’re following the specs. And he’s there to make sure that they’re getting the job done and doing the right thing when they’re doing it, as in following the specs.” Tr. 270:7-10.

Both Union and Employer witnesses testified that foremen assign workers in their crew to work areas. Lopez testified that the welder foreman “would place” the welders and “tell [them] where [they] would be working” (i.e., which unit to work on at the site). Tr. 27:13-19. When asked how he determined where to “place” welders during his brief stint as foreman, Lopez testified that he did so “according to how each one is capable of doing what. And which one is better - - works better than the other one.” Tr. 29:18-20. But Lopez also testified, “[The General Foreman] showed me the work plans and how to arrange people . . . He gives me a place of where to work, and the people that he wants me to work with.” Tr. 29:19 – 30:1.

There was a variety of testimony about what foremen do after designating initial work areas. Lopez testified that if the work changed during a shift, further instruction would come from the general foreman. (Tr. 60:18 – 61:2). Lopez testified that the insulation foreman spends 80% of his time “putting insulation” and 20% of his time “going around and explaining to his workers how to do their job.” Tr. 61:20-25. Lopez claimed that one foreman, Trevino, spent all of his time telling employees where they should work and how they should work. Tr. 62:1-5. Jonas testified that foreman perform production work about 90% of the time. Tr. 271:19-23.

Union witness Frias testified that foremen “supervise” people and “make sure they’re doing the right thing.” Tr. 96:6-9. He then explained that this meant providing workers with measurements and ensuring that the material is installed. Tr. 96:14-17.

However, other layers of management are also regularly present in the field. Frias testified that the general foreman was “around about three or four times a day checking the work.” Tr. 96:25-1. Bergeron testified that “General foremen are in the field all day with the exception of maybe, I don’t know, an hour or so where they may go into their office and do their timesheets.” Tr. 205:23-206:2. Bergeron testified that the project coordinator is also on the jobsite on a daily basis to check the lines and duct work. Tr. 204:23-205:4.

Foremen have virtually no discretion over changes in the work. Bergeron was asked on cross examination, “Could a good foreman look at blueprints and say, oh you know, what supervisor, looking at this, I think maybe we should do it this way? If the foreman is really good at reading blueprints?” Tr. 247:9-12. Bergeron replied that a foreman could “make any suggestion he would like.” Tr. 247:13. Bergeron further agreed that reading blueprints requires discretion and training. Tr. 247:17-19. However, Bergeron also indicated that “basically the guys that do the blueprint reading is our superintendent, site superintendent, site managers and our project coordinator.” Tr. 247:19-22. Bergeron was unable to identify any foremen at Classic, in any plant, who are able to read blueprints “well.” Tr. 247:23-25.

If a foreman sees that a grid is not fitting and has a recommendation, the foreman must go to the superintendent. Tr. 248:11-21. Jonas testified that a foreman cannot make decisions about “changing the way work is being done,” such as deciding to stop working in one area and move to another. Tr. 273:2-7. Although Jonas testified that foremen “come up with a game plan,” he explained that means deciding who is going to do particular tasks within a crew. Tr. 270:24-271:6.

Foremen have extremely limited ability to take any meaningful action with respect to other employees’ work. Frias testified that if material is not installed correctly, a foreman could make an insulator “take it out - - out and he could - - and he will – probably call his supervisor.” Tr. 96:18-21. Frias could not recall any instances where something was installed incorrectly and a supervisor was

called, due to the general foreman's routine presence. Tr. 96:22- 97:1. Lopez testified that mistakes are flagged by the general foreman, and the information is passed along the "chain" (e.g., general foremen to foremen to workers). Tr. 33:13-17.

In terms of consequences for poor work by a foreman's crew, Bergeron testified that if a foreman does not ensure that the work "gets done", he would "have to explain to his general foreman why that work didn't get done." Tr. 244:19-22. He further stated if a foreman has a "pattern of not getting the work done" by virtue of his own fault, then there would most likely be an evaluation as to "what this foreman actually knows and how he performs his work." Tr. 245:6-11. The foreman might receive additional training or move back into a mechanic A position, but he would not necessarily be "disciplined." Tr. 245:10-19. When pressed, Bergeron agreed that a foreman could be disciplined for not getting a job done, but he could not think of an example in which a foreman was disciplined for not getting the job done at the Fruitland plant, or at any other plant. Tr. 254:1-11. There were no examples of an instance when a foreman was moved to a Mechanic A position.

With respect to other duties, Bergeron testified that the foremen participate in the safety task assessments ("STA") that are conducted each morning. The purpose of the STA is:

To make sure that the crew fully understands their task, because they get moved around in different areas. So whenever you move a crew, you have to have a STA to perform that work. And that STA is a collaboration of everyone in that crew. You got your A Mechanics, your B Mechanics and your helpers. So everybody inputs to make sure that area that moving is, is safe before they begin work.

Tr. 272:1-9.

When the workers get to their work area, "they go to the STA and fill that out." Tr. 324:4-9.

The remainder of the testimony about safety issues and safety inspections clarified that certain employees are responsible for safety. Bergeron testified that there are "safety employees" at the Fruitland plant, whose sole responsibility is ensuring compliance with safety rules. Tr. 254:16:17.

The Union witnesses corroborated this evidence, and repeatedly stated that an employee who is not currently at issue, Vincent Jaquez, was responsible for safety. Tr. 42:5-9 (Lopez discussing Vincent Jaquez); Tr. 109:16 – 110:17 (Frias explaining Jaquez performs safety inspections, and “inspects that the people - - or make sure that the people are doing a safe job around the plant”).

It was undisputed that foremen cannot give workers the day off, approve overtime, give raises, or issue discipline. Tr. 57-60.

## **ii. The Hearing Officer’s Findings**

On September 15, 2017, Hearing Officer Sandra L. Lyons issued a report recommending that the Union’s challenges to 10 ballots should be sustained, and that those ballots should not be opened or counted. (Hearing Officer’s Report on Challenged Ballots, “Report,” at pg. 1). Three of the sustained challenges concern foremen Trevino, Godoy, and Gonzalez-Flores. (*Id.*).

The Hearing Officer’s determination was solely based on her conclusion that foremen direct employees. (Report p. 8). The Hearing Officer concluded that the foremen assigned work “based upon that foremen’s assessment of skill and knowledge of the employee,” which would be “common knowledge at the jobsite and not a specific use of independent judgment that only foremen or higher up authority would possess.” (Report p. 9).

The Hearing Officer concluded that foremen “responsibly direct employees to specific tasks, inspect their work, conduct safety inspections of their crew and can suffer adverse consequences if the employees fail to get their work done or do their work poorly.” (Report, p. 9). With respect to the alleged “adverse consequences,” the Hearing Officer relied on Bergeron’s testimony that a foreman could be demoted if his crew consistently made errors or failed to complete a job. (Report, p. 9). The Hearing Officer elsewhere noted that Bergeron “has only visited the Fruitland jobsite on three occasions at most.” (Report, p. 4).



The Hearing Officer made the following findings regarding each alleged supervisor:

The evidence presented in the hearing established that David Trevino (Trevino) was a welder-foreman. Trevino would advise the welders at the beginning of each day what they were to do and where they were to work in the plant. Trevino directs employees to the ducts that are to be welded, he provides measurements for the welders, and then inspects their work when the welders have finished their work.<sup>2</sup> Trevino spent 100% of his time giving instruction to other employees and did not do insulation work, according to Lopez. According to Jonas, however, Trevino performs welding. Trevino did not have the authority to discipline other employees and would have to go to the general foreman if he experienced a discipline issue with an employee.

The evidence presented in the hearing established that Juan Godoy (Godoy) is a metal worker foreman. Besides installing metal and insulation, Godoy provides the metal workers with measurements that they have to use, and inspects their work, ensuring the material is installed properly. Godoy, along with [General Foreman Eliseo] Medrano, decides who will work in specific locations. Jonas testified that Godoy lines out the job for his crew and ensures they know what they are supposed to be doing.

Jose Gonzalez-Flores (Gonzalez-Flores) is an insulation foreman. He is known by the nickname “Cadaver”. Gonzalez-Flores arranges the insulators on the jobsite, telling them where to work. Gonzalez-Flores tries to handle problems with the insulators at his level but if they do not pay attention to him, he will send it to the General Foreman Medrano. Gonzalez-Flores carries a radio and can communicate with other foremen as to where they are going to work. Further, Medrano can communicate with Gonzalez-Flores and advise him that things have been done wrong and Gonzalez-Flores directs the insulators to fix their mistakes. Gonzalez-Flores spent 80% of his time doing insulation work and 20% of his time explaining and giving direction to other employees.

(Report, pp. 5-6).

On September 29, 2017, Classic filed Exceptions to the Hearing Officer’s Report. (“Exceptions”). The Exceptions disputed the Hearing Officer’s findings with respect to multiple issues, including the findings regarding Trevino’s, Godoy’s, and Gonzalez-Flores’ alleged supervisory status.

### **C. The Regional Director’s Decision**

On October 17, 2017, the Regional Director issued the Order. The Regional Director affirmed the Hearing Officer’s findings. (Order p. 1). As previously explained, if the Regional Director

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<sup>2</sup> The testimony about Trevino’s alleged instruction to welders came from Frias. Frias testified that Trevino was “[s]ometimes . . . around the area” where Frias was working. Tr. 95:14-17.

erroneously affirmed just two of the challenges, it would be sufficient to affect the results of the election.

The Regional Director's findings regarding responsible direction essentially mirror the Hearing Officer's findings. He concluded, "Foremen decide which person on her or her crew does [sic] will perform what tasks on a given day and, based on that assessment, come up with a game plan about how the work will be done and how it will be executed." (Order, p. 4). He further found that foremen "direct their crews and make sure they are following specifications and doing the job properly," and "make safety task assessments of their crew." (Order, p. 4). Like the Hearing Officer, the Regional Director relied on Bergeron's testimony that a foreman could be demoted if a crew did not complete their work, as well as "other testimony that if a foremen did not follow through with the general foreman's general plans for accomplishing work, the foreman could be disciplined." (Order, p. 4).

The Regional Director did not separately address the evidence regarding each alleged supervisor. He simply relied on the Hearing Officer's conclusions.

### **ARGUMENT**

It is well-established that a "party seeking to exclude an individual from voting has the burden of establishing that the individual is, in fact, ineligible to vote." *Iberia Road Markings Corp.*, No. 29-CA-27930, 2007 NLRB LEXIS 183, at \*50 (May 18, 2007). The Union challenged the three employees presently at issue and, as such, the burden was on the Union to show in each instance "that the challenged employees did not perform bargaining-unit work, not on the Employer to show that they did." *Sweetener Supply Corp.*, 349 NLRB 1122, 1122 (2007).

Section 2(11) of the Act defines the term supervisor as:

Any individual having authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such

authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In addition, the putative supervisor must exercise independent judgment with respect to the relevant indicia of supervisory status. *See Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006). The Board held, “as a starting point, to exercise ‘independent judgment’ an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning or comparing data.” *Id.* at 692-93. The Board must evaluate the “*degree* of discretion exercised by the putative supervisor.” *Id.* Independent judgment does not exist if the decision is “dictated or controlled by detailed instructions, whether set forth in company policy or rules, [or] the verbal instructions of a higher authority,” or if it is routine or repetitive in nature. *Id.* at 693.

Importantly, the Union retains the burden of establishing supervisory status and, where the evidence is conflicting or inconclusive, the Board finds that supervisory status has not been established. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989) Moreover, “purely conclusory evidence is not sufficient to establish supervisory status;” rather, the Board “requires evidence that the employee actually possesses the Section 2(11) authority at issue.” *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006).

**A. Both Assignment and Responsible Direction Were Considered By the Regional Director.**

In the Union’s Opposition to Request for Review (“Opposition”), it argued that some cases relied upon by Classic were inapplicable because they focused on whether foremen assign work. The Union emphasized that the Regional Director’s findings were based on responsible direction, not assignment. However, the Regional Director’s Order demonstrates that he conflated the two concepts.

Confusion between assignment and responsible direction is common. The Board attempted to distinguish between the admittedly ambiguous concepts of “responsibly to direct” others and “assigning” work following criticism from the U.S. Supreme Court.

The Board defined “assign” as “the act of designating an employee to a place . . . appointing an employee to a time . . . or giving significant overall duties, i.e., tasks, to an employee.” *Oakwood Healthcare*, at 689. The dissent expressed concern that this definition, in particular the assignment of employee to significant overall tasks, would result in a lack of distinction between “responsibly to direct” and “assign.” *Id.* at 704. The majority disagreed, reasoning that direction “may encompass ad hoc instructions to perform discrete tasks; assignment does not.” *Id.* at 690.

In explaining the phrase “responsibly to direct,” the Board noted that “the definition sought to distinguish two classes of workers: true supervisors vested with ‘genuine management prerogatives,’ and employees such as ‘straw bosses, lead men, and set-up men’ who are protected by the Act even though they perform ‘minor supervisory duties.’” *Id.* at 687-88 (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974)). Accordingly, “responsible” direction means “the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse action may befall the one providing the oversight if the tasks performed by the employee are not performed properly.” *Id.* at 692.

In short, “[i]t must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It must also be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” *Id.* The Board contended that the “emphasis on accountability contained in the definition” would prevent “responsibly to direct” to be construed in an overly inclusive fashion. *Id.*

The distinction between assignment and responsible direction continues to be problematic in practice. In *SR-73*, 365 NLRB No. 119 (Aug. 17, 2017), the Acting Regional Director found that certain nursing personnel were not supervisors under the Act, because they did not evaluate employee skills when giving ad hoc instructions. Chairman Miscimarra argued that the Acting Regional Director (ARD) “improperly conflated independent judgment in *assigning* employees with independent

judgment in *directing* employees.” *Id.* at \*8. The ARD focused on whether the employees in question demonstrated independent judgment ““in determining *which* employee should be assigned to perform the required tasks.”” *Id.* Chairman Miscimarra found “[t]his would be a proper consideration if the issue under analysis was whether independent judgment was being exercised in *assigning* employees.” *Id.*

The Regional Director’s Order demonstrates that he considered the manner in which employees were assigned overall tasks (e.g., foremen’s ability to “assign”) in finding supervisory status:

I agree with the hearing office that specific evidence was provided that foremen responsibly direct mechanic and welder employees to complete specific tasks . . . this direction is not routine or based only on common knowledge of which employees have certain skill and which employees work well together. Foremen decide which person on his or her crew does [sic] will perform what task on any given day, and based on that assessment, come up with a game plan about how the work will be done and how it will be executed . . . There is no evidence that foremen relied on any sort of manual or established policies or procedures in executing their tasks and directing employees.

(Order, p. 4).

Indeed, the evidence about direction by foremen was almost entirely centered on the determination of which employee would be assigned to a particular area/job for the day. The evidence further demonstrated that foremen could not deviate from the plans or modify the work. Tr. 248:11-21; 273:2-7. The testimony regarding coming up with a “game plan” was also in the context of making initial assignments for the day: “Q: When you say game plan, is that in terms of just deciding who’s going to do that particular work within a crew? A: Yes, that’s correct.” Tr. 271:4-6.

Moreover, the cases relied upon by Classic are factually analogous to the matter at hand regardless of whether the Board considered “assignment” or “responsible direction” of tasks to be the matter at issue. Classic will therefore address both assignment and responsible direction.<sup>3</sup>

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<sup>3</sup> It is undisputed that the other indicia of supervisory status are not applicable, so Classic will not address these remaining indicia.

## **B. The Foremen Do Not Use Independent Discretion in Assigning Work.**

Classic does not dispute that foremen provide initial assignments to workers. However, foremen do not exercise independent discretion in doing so. “Assigning employees according to their known skills is not evidence of independent judgment.” *Shaw, Inc.*, 350 NLRB 354, n. 9 (2007). For example, in *UPS Ground Freight, Inc.*, 365 NLRB No. 113 (July 27, 2017), the Board held that a UPS dispatcher who assigned drivers to specific routes was not a statutory supervisor. The dispatcher received direction about daily routes and stops. *Id.* at \*2-3. He then had the responsibility of assigning a driver to each route. *Id.* The dispatcher often designated drivers based on their preference, but he sometimes considered a driver’s skills in determining their route assignment. *Id.* There was no evidence that the dispatcher could require a driver to accept the route assignment – if a driver rejected the route the dispatcher would refer him or her to management. *Id.*

The Board concluded that the dispatcher did not exercise meaningful discretion in assigning routes. Indeed, the drivers’ “established skill sets were largely determinative of what routes they would be assigned.” *Id.*

Similarly, the Board has consistently found that assigning work pursuant to blue prints or specifications does not require independent discretion. In *Volair Contractors, Inc.*, 341 NLRB 673 (2004), the individual in question was responsible for laying out the job and assigning tasks to his crewmembers with reference to a blueprint provided by management. *Id.* at 675. The Board held that this “circumscribed authority does not indicate the use of independent judgment.” *Id.*

In *Electrical Specialties, Inc.*, 323 NLRB 705 (1997), the employees in question were leadmen or job leaders. They “laid out the work pursuant to the general contractor’s specification, they ordered materials, signed purchase orders and directed the other electricians to do the work in accordance with the specifications.” *Id.* at 707. The Board held these employees were not statutory supervisors, in part,

because “their assignments of work to other employees were based upon the existing specifications and were routine in nature.” *Id.*

**C. Foremen Do Not Responsibly Direct Employees Using Independent Judgment or Discretion, Nor Are They Accountable for the Work Performance of Others.**

Responsible direction involves both oversight and accountability. The individual must have “the authority to direct the work and the authority to take corrective action, if necessary. It must also be shown that there is a prospect of adverse consequences for the putative supervisor.” *Oakwood Healthcare*, 348 NLRB at 692.

In *Armor Construction, LLC*, Case 03-CA-148130; JD-13-16, 2016 NLRB LEXIS 106 (Feb. 12, 2016) the Administrative Law Judge concluded the alleged supervisors did not responsibly direct other employees. The ALJ reached this conclusion because the direction of the work came from a general foreman and blueprint. *Id.* at \*6-7, \*30. In addition, the work in question was routine and required “little direction.” *Id.* at \*36. There was no independent judgment in directing work “because [the employees] knew what tasks to perform.” *Id.* Rather, “the foremen, as the more experienced person in the craft on site, merely provide[d] guidance to the helpers as a means of training.” *Id.* at \*37.

As an initial matter, the Union has not established that foremen meaningfully direct work outside of initial assignments. One Union witness testified that Gonzalez-Flores spent 80% of his time performing insulation work and only 20% providing any sort of direction. Classic’s witnesses opined that foremen spend 90% of their time doing the physical work (i.e., installing insulation, performing metal work or welding). Notwithstanding, the evidence does not support a finding of responsible direction.

**i. Foreman Do Not Exercise Independent Judgment or Discretion in Directing Work.**

Foremen do not exercise independent judgment in directing work. The testimony provided by

Union witness Frias is instructive. Frias claimed that a foremen “actually supervises” other workers.<sup>4</sup> But when pressed for details, he indicated foremen provide measurements or ensure the material is well installed. Tr. 96:10-17. If materials are not well installed, the foremen could make the employee remove it and “probably will call his supervisor.” Tr. 96:18-21. Frias was unaware of any instance where this actually occurred, primarily because the general foreman was around “about three or four times a day checking work.” Tr. 96:22-97:1.

As with initial assignments, the details of the ongoing work is predetermined. *See Volair Contractors, Inc.*, 341 NLRB 673 (2004); *Electrical Specialties, Inc.*, 323 NLRB 705 (1996); *Armor Construction, LLC*, 2016 NLRB LEXIS 106 (Feb. 12, 2016).<sup>5</sup> The details of each assignment at Classic are established through blue prints and specifications. The blue prints and specifications contain measurements. The general foremen convey this information to the foremen, and the foremen relay the measurements and specifications to the crew. In “overseeing” or “inspecting” this work, the foremen simply ensure the work matches up with the prescribed measurements/criteria.

The evidence shows that the work the foremen allegedly supervise, whether welding, insulation or metal work, is routine and repetitive.<sup>6</sup> The employees perform the same tasks, just in different areas (e.g., inside or outside) and on different ducts or pipes. The routine nature of the work is underscored by the fact that workers perform work outside their classification when necessary.<sup>7</sup>

The consistent oversight by another layer of supervisors also cuts against the finding of supervisory status. *Shaw, Inc.*, 350 NLRB 354 (1997). In *Shaw*, the Board noted that the employees’

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<sup>4</sup> Generalized testimony about the discretion to direct employees is not sufficient to establish supervisory status. *SR-73*, 365 NLRB No. 119 (Aug. 17, 2017). For example, in *SR-73* a nurse testified that she considered employee skill level and patient acuity when assigning a cart nurse to an open slot. *Id.* \*1. The Board rejected her testimony because she failed to provide any such examples. *Id.*

<sup>5</sup> *Volair* and *Electrical Specialties* provided a combined analysis of multiple supervisory indicia, including responsible direction.

<sup>6</sup> In *Croft Metals, Inc.*, 348 NLRB 717 (2006), the Board found that the employees in question did not responsibly direct with independent judgment, in part, because the direction did not involve a degree of discretion that rise above “routine or clerical.” *Id.*

<sup>7</sup> The only exception is welding, as welding requires a certification.



(foremen) direction was subject to “close scrutiny” by higher management. *Id.* at \*3. Specifically, management visited the jobsite in question “at least once a day, checking on progress and providing guidance as needed.” *Id.* Foremen also had means of communicating with higher management if they were not on site. *Id.* Thus, the Board held that the foremen served “as a conduit for carrying out the Respondents’” assignments, and that the work “[was] regularly monitored by individuals who ha[d] both the authority and responsibility to ensure its proper performance.” *Id.*

Finally, the foremen’s involvement with safety does not require independent judgment or discretion. The Regional Director found:

part of a foreman’s job is to make safety task assessments of their crew. There is no evidence that foremen relied on any sort of manual or established policies or procedures in executing their tasks and directing employees. Each foremen uses their own discretion.

(Order p. 4).

There is scant testimony to support this conclusion. There was testimony that foremen conduct STAs, but the testimony indicated STAs are a collaborative effort with all employees in that area. It is unclear whether the STAs are based on set criteria, because there was no testimony to this effect. Notwithstanding, it appears to be undisputed there are designated safety employees. “Safety training” is not an established aspect of the foreman position.

The lack of independent judgment or discretion in directing work defeats the Union’s claim that foremen are supervisors.

## **ii. Foremen Are Not Accountable for the Work of Others**

Even if foremen did exercise independent judgment or discretion, foreman are not accountable for the work of their crew members. The Regional Director’s determination in this regard is unsound and lacks evidentiary support. In *Atlantic City Electric Co.*, Case No. 04-RC-193066, 2017 NLRB Reg. Dir. Dec. LEXIS 48, \*15 (Mar. 17, 2017), the Regional Director for Region 4 explained:

[A]n individual will be found to have the authority to responsibility direct other employees only if the individual is *accountable* for the performance of the tasks by the other employee. Accountability means that the employer has delegated to the putative supervisor the authority to direct the work and the authority to take corrective action if necessary, and the putative supervisor faces the prospect of adverse consequences if the employees under his or her command fail to perform their tasks correctly.

First, there is not sufficient evidence that a foreman can take corrective action. Frias claimed that a foreman could make an insulator remove insulation. However, he then backtracked and stated that the foreman would probably call the general foreman first.<sup>8</sup>

Further, foremen are not accountable for the performance of others. The Regional Director relied on the speculative testimony of Bergeron to support this conclusion. Classic is not “discrediting” Bergeron’s testimony. The Union has the burden of showing supervisory status. It attempted to meet this burden by eliciting speculative testimony on cross examination of Bergeron:

Q: Now what happens if the foreman doesn’t fulfil those - - doesn’t make sure that work gets done?

A: Well, you have to explain to his general foreman why that work didn’t get done. And it could be numerous reasons. I mean it could be that other craft was working the area and he was unable to perform that task. . . It could be that he didn’t have the material he needed . . . Could have been cut outs that were in the area, that he didn’t quite understand. And he had to wait for a general foreman . . .

Q: What if a foreman has a pattern of not getting the work done?

A: Okay. And it being his fault, or –

Q: Yeah.

A: Well, then I’m sure there would be an evaluation as to what this foreman actually knows and how he performs his work.

Q: And then based on an evaluation, could he be disciplined? He or she be disciplined?

A: I don’t think - - I wouldn’t say disciplined, but could be knocked back down to a Mechanic A. And we have programs, as I’ve said before, and evaluations and performance reviews. So when that’s done, we determine where the guys are weaker at

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<sup>8</sup> The ability to take corrective action is significant. It is highly questionable that an employer would hold an employee accountable for something entirely beyond his control.

and what - - and what help they may need. So we offer that in the training program I provide.

Tr. 244:19-245:19.

In short, the testimony is far from a clear assertion that foremen will be disciplined if work is not performed in his crew, and the Union presented no other evidence to support this element.

### **CONCLUSION**

The Regional Director's Order is clearly erroneous, as it is not supported by the testimony at the hearing. Based on the foregoing reasons, the Board should reverse the Regional Director's Order.

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Respectfully submitted,  
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### **CERTIFICATE OF SERVICE**

I, Joseph Dreesen, certify that on February 14, 2018, I caused the *Employer's Brief on Review to the National Labor Relations Board* in the above-captioned matter to be filed electronically.

The undersigned also hereby certifies that on February 14, 2018, a true and correct copy of the above and foregoing document was served on International Association of Heat & Frost Insulators and Asbestos Workers, Local Union 76, Attorneys Caroline N. Cohen and David W.J. Fujimoto, via electronic mail at [nlrbnotices@unioncounsel.net](mailto:nlr notices@unioncounsel.net), [ccohen@unioncounsel.net](mailto:ccohen@unioncounsel.net), and [dfujimoto@unioncounsel.net](mailto:dfujimoto@unioncounsel.net) and Regional Director of Region 28 of the National Labor Relations Board Cornele Overstreet at [cornele.overstreet@nlrb.gov](mailto:cornele.overstreet@nlrb.gov)

/s Joseph Dreesen  
Joseph Dreesen